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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/828,589	04/22/2004	Timothy E. McCue		5564

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EXAMINER

JACKSON, ANDRE L

ART UNIT PAPER NUMBER

3677

DATE MAILED: 03/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/828,589

Applicant(s)

MCCUE ET AL.

Examiner

Andre' L. Jackson

Art Unit

3677

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 14 March 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 11, 12, 14 and 15.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see 13 below.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☒ Other: See Continuation Sheet.


**ROBERT J. SANDY
PRIMARY EXAMINER**

Continuation of 13. Other: Applicant's after final amendment submitted March 14, 2006 has been considered but is found to be non-persuasive. Applicant sets forth arguments on page 1 of the above amendment that Kirschner fails to disclose or suggest all the limitations recited in applicant's claims. In particular, applicant emphasizes that the disclosure of Kirschner neither states or implies that the second hinge moves freely along an unthreaded hinge pin. Here, the Examiner agrees with applicant that the disclosure of Kirschner probably will not state or imply applicant's assertion because applicant claims requires a first connecting member is freely movable along the unthreaded hinge pin, not the second hinge as stated. As to the limitations claimed, Kirschner discloses a connecting member (20), an unthreaded hinge pin (22) which as seen in Fig. 4, includes a polygonal head connected to a smooth cylindrical shank, which is free of threads and a distal end opposite the polygonal head including a threaded end to support an engaging nut (34). Since, the shank of the hinge pin is smooth and free of threads and more importantly, is the part of the hinge pin engaged with the connecting member, the Examiner interprets the hinge pin of Kirschner as an unthreaded hinge pin. Next, the Examiner would like to point out that the recited limitation "the first connecting member is freely movable along the unthreaded hinge pin is not a positive limitation. It has been held that the recitation that an element is "capable" of performing a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. In re Hutchison, 69 USPQ 138. However, for argument sake, if applicant was to amend the claim to positively claim the first connecting member freely moves along the unthreaded hinge pin, this limitation would still be anticipated by Kirschner because, as stated above, the shank part of the hinge pin of Kirschner is formed smooth and free of threads. The first connecting member of Kirschner defines an interior cavity or central bore fitting about the shank part that would allow the first connecting member to move freely along the shank part of the hinge pin, pending the upper and lower sleeves (24) adjustment positions. Further, it is clearly seen that the first hinge (36, 18) of Kirschner can be adjusted vertically via the upper and lower sleeves and the arrangement of the second hinge being connected to the first hinge by the hinge pin, follows the first hinge, thus, the first connecting member is free to rotate about the shank part or unthreaded part of the hinge pin. In view of the explanation and reasoning described above, the Examiner believes all of applicant's outstanding issues have been addressed and accordingly, claims 11, 12, 14 and 15 remain rejected as being unpatentable over Kirschner.